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EXAMINER				
BOMBERG, KENNETH				
ART UNIT		PAPER NUMBER		
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

Patent-ch@btlaw.com

Office Action Summary**Application No.**

10/552,932

Applicant(s)

HAYDAY, GEOFFREY DENIS

Examiner

KENNETH BOMBERG

Art Unit

3754

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 14 May 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 30-46 is/are pending in the application.
- 4a) Of the above claim(s) 34 and 35 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 30-33 and 36-46 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 11 October 2005 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB08)
- Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
- Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Introduction

1. This action is in response to Applicant's election of species filed 14 May 2009. Claims 1-29 have been canceled; Claims 30-46 are pending, of which claims 34-35 are withdrawn from consideration in this office action. Applicant should note that this application has been reassigned to Examiner Kenneth Bomberg.

Election/Restrictions

2. Applicant's election of the Species of Figs. 8-12 in the reply filed on 14 May 2009 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).

Applicant's remarks that Figure 12 was inadvertently omitted from Species V are noted with appreciation. The Examiner agrees that the Species of Fig. 12 should be grouped with Figs. 8-11.

While Applicant has identified claims 30-46 as being readable on the elected species, claims 34-35 as disclosed in the specification are not directed to the elected species of Figs. 8-12. Claim 34 requires, inter alia, two apertured plates or filters fitted within the neck; this embodiment appears to be described on the last paragraph of specification page 2 (and possibly the 3rd full paragraph on page 4), the embodiments are described as "another embodiment" or "a further embodiment". Consequently, claims 34-35 are withdrawn as being directed to a non-elected species.

3. Claims 34 and 35 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected Species, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 14 May 2009.

Information Disclosure Statement

4. The listing of references in the Search Report is not considered to be an information disclosure statement (IDS) complying with 37 CFR 1.98. 37 CFR 1.98(a)(2) requires a legible copy of: (1) each foreign patent; (2) each publication or that portion which caused it to be listed; (3) for each cited pending U.S. application, the application specification including claims, and any drawing of the application, or that portion of the application which caused it to be listed including any claims directed to that portion, unless the cited pending U.S. application is stored in the Image File Wrapper (IFW) system; and (4) all other information, or that portion which caused it to be listed. In addition, each IDS must include a list of all patents, publications, applications, or other information submitted for consideration by the Office (see 37 CFR 1.98(a)(1) and (b)), and MPEP § 609.04(a), subsection I. states, "the list ... must be submitted on a separate paper." Therefore, the references cited in the Search Report have not been considered. Applicant is advised that the date of submission of any item of information or any missing element(s) will be the date of submission for purposes of determining compliance with the requirements based on the time of filing the IDS, including all "statement" requirements of 37 CFR 1.97(e). See MPEP § 609.05(a).

5. The listing of references in the specification is not a proper information disclosure statement. 37 CFR 1.98(b) requires a list of all patents, publications, or other information submitted for consideration by the Office, and MPEP § 609.04(a) states, "the list may not be incorporated into the specification but must be submitted in a separate paper." Therefore, unless the references have been cited by the examiner on form PTO-892, they have not been considered.

Drawings

6. The drawings are objected to because

The reference character "20" in the drawings appears to be associated with the wrong part. As described in the specification, the "bass 20" is associated with the intermediate powder reservoir and not the base of the container (10) as shown in the drawings.

7. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the:

Filter plate being formed of a woven fabric according to claim 35.

The intermediate reservoir comprising two apertured plates, as specifically described in claims 34-35.

must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

8. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as “amended.” If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either “Replacement Sheet” or “New Sheet” pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Specification

9. The disclosure is objected to because of the following informalities:

Appropriate section headings have been omitted.

Appropriate correction is required.

Claim Rejections - 35 USC § 101

10. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

11. Claims 43-46 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. These claims are directed to neither a “process” nor a “machine,” but rather embraces or overlaps two different statutory classes of invention set forth in 35 U.S.C. 101 which is drafted so as to set forth the statutory classes of invention in the alternative only (see MPEP 2173.05(p) II).

Claim Rejections - 35 USC § 112

12. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

13. Claims 30-46 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In Reference to Claim 30

The following recitations lack antecedent basis within the claim: line 3, “the wall”, “the outer end”; line 8, “the closed end”; line 9, “the interior”; and line 11, “the airflow”.

The powder as recited in the context of in lines 2 and 10-13 along with the further powder recitations in claims 43 and 46 makes the scope of the claim unclear. Specifically, it is unclear if the claim is directed to the subcombination of the container and dispensing device or the combination of the container and dispensing device with the powder.

In line 4, “of the type” renders the “nozzle” recitation indefinite.

The term “small” in lines 4 and 9 is a relative term which renders the claim indefinite. The term “small” is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention.

In lines 5 and 10, the functional language “...squeezing the container” renders the claim indefinite as it is unclear if this recitation imparts a structural limitation to the container. Further, the claim lacks the necessary recitation of corresponding structure to perform the function (i.e. the container being resiliently deformable)

In line 12, the term “in general” is indefinite.

In Reference to Claim 32

The claim is unclear in that it does not specify that the “apertured plate or a filter” is the same structure as the “plurality of small holes” in the closed end of the cup as recited in claim 30.

In Reference to Claims 33 and 35

The term “such as” renders the recitation of the “woven wire or a woven plastics mesh” indefinite.

In Reference to Claims 34-35

The recitations in these claims, as they depend from claim 30, with respect to the “two apertured plates or filters fitted within the neck” renders the claims indefinite. The claim 34-35 embodiment appears to be described on the last paragraph of specification page 2 (and possibly the 3rd full paragraph on page 4); the embodiments are described as “another embodiment” or “a further embodiment”. Claim 30, which requires a cup

having a closed end with a plurality of small holes, is directed to the elected species of Figs. 8-12. It is unclear if these claims are crossing mutually exclusive species, drawn to a highbred embodiment, or is attempting to describe the elected species.

In Reference to Claim 36

In line 2, “the closed end” lacks antecedent basis;

In line 3, the claim is unclear in that it does not specify that the “one exit aperture” is the same structure as the “one or more small holes” in the nozzle recited in claim 30, line 4.

In Reference to Claim 37

In lines 2-3, “the first cup” lacks antecedent basis.

In line 4, “the end” lacks antecedent basis.

In Reference to Claim 42

In line 2, “in general” lacks antecedent basis.

It is unclear if the recitation of the container wall being “resiliently deformable by squeezing” further limits the claim as it is unclear if the functional recitations in claim 30 already require this limitation.

In Reference to Claims 43-46

This claim appears to claim both “A method of discharging powder from a container and a dispensing device as claimed in claim 30”. A single claim which claims both an apparatus and the method steps of using the apparatus is indefinite under 35 U.S.C. 112, second paragraph (see MPEP 2173.05(p) II).

In Reference to Claim 43

In line 4, “the flexible container wall” lacks antecedent basis.

In Reference to Claim 44

In line 4, “the discharge end of container” lacks antecedent basis.

In Reference to Claim 45

In line 4, “the nozzle opening” lacks antecedent basis.

Claim Rejections - 35 USC § 102

14. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

15. Claims 30-33, 36, 42, and 43-44 are rejected under 35 U.S.C. 102(b) as being anticipated by US Patent No. 29,699 to A. Isaacsen (Isaacsen).

Isaacsen teaches:

In Reference to Claim 30

A powder container and dispensing device (Fig. 1) comprising a container (A) which in use is partially filled with the powder (noxious powder) and includes a neck (around chamber B), a powder dispensing nozzle (C) provided in the wall of the container at the outer end of the container neck (see Fig. 1), the nozzle being of the type

having one or more small holes through which powder can be ejected (terminal outlet of tube C), the powder being dispensable by squeezing the container to pressurize its contents (lines 39-50), and an intermediate powder reservoir (B) in or on which some of the powder within the container becomes lodged in use, wherein the intermediate reservoir comprises a cup which is fitted within the neck (see Fig. 1) with the closed end of the cup (bottom b) spaced from the nozzle, and the closed end of the cup includes a plurality of small holes therein (lines 52-53) to allow powder to enter the interior of the cup and in which powder can become lodged, such that on squeezing the container, powder lodging in or on the intermediate reservoir is entrained in the airflow through the hole or holes in the nozzle to be discharged therewith, so that in general during each discharge action only powder in or on the intermediate reservoir will exit via the nozzle (lines 38-57).

In Reference to Claim 31

The powder container and dispensing device of Isaacsen, the operation of which is described in lines 38-57, is operable in the manner described in claim 31.

In Reference to Claim 32-33

The intermediate reservoir (B) comprises an apertured plate or a filter (b) formed from a woven wire fabric (cloth) fitted in the neck of the container just below but spaced from the nozzle (see Fig. 1; lines 52-56).

In Reference to Claim 36

The nozzle (C) is formed by a second cup (domed hemispherical portion of chamber B above bead) which fits over and around the neck (bead portion at base of

hemispherical portion of chamber B is "over and around the neck), the closed end of the second cup including one exit aperture (at top) through which powder is discharged when the container is squeezed.

In Reference to Claim 42

The container wall is resiliently deformable by squeezing and reverts to its normal shape when the squeezing force is removed (lines 31-32 and 41-50).

In Reference to Claim 43-44

In lines 38-51, Isaacsen teaches the method of using the device holding the device upright, inverted or inclined in any direction. The claimed method of discharging powder follows directly from the use of the device of Isaacsen.

16. Claims 30-32, 36-37, and 40 are rejected under 35 U.S.C. 102(b) as being anticipated by US Patent No. 3,221,952 to De See (De See).

De See teaches:

In Reference to Claim 30

A powder container and dispensing device (Fig. 1) comprising a container (11) which in use is partially filled with the powder (freely fluent powders; col. 2, lines 61-63) and includes a neck (16), a powder dispensing nozzle (10) provided in the wall of the container at the outer end of the container neck (see Fig. 1), the nozzle being of the type having one or more small holes (50) through which powder can be ejected, the powder being dispensable by squeezing the container to pressurize its contents (lines 51-53), and an intermediate powder reservoir (space 41) in or on which some of the powder within

the container becomes lodged in use, wherein the intermediate reservoir comprises a cup (20) which is fitted within the neck (see Figs. 4-5) with the closed end of the cup (21) spaced from the nozzle, and the closed end of the cup includes a plurality of small holes therein (30) to allow powder to enter the interior of the cup and in which powder can become lodged, such that on squeezing the container, powder lodging in or on the intermediate reservoir is entrained in the airflow through the hole or holes in the nozzle to be discharged therewith, so that in general during each discharge action only powder in or on the intermediate reservoir will exit via the nozzle (the powder container and dispensing device of De See has the same structure as claimed and is capable of performing in the same manner).

In Reference to Claim 31

The powder container and dispensing device of De See, is operable in the manner described in claim 31.

In Reference to Claim 32

The intermediate reservoir (41) comprises an apertured plate (21) fitted in the neck (16) of the container.

In Reference to Claim 36

The nozzle (10) is formed by a second cup (12, 35) which fits over and around the neck (16), the closed end of the second cup including one exit aperture (50) through which powder is discharged when the container is squeezed.

In Reference to Claim 37

The second cup is slidable relative to the neck (outer sleeve slides relative to the neck see Figs. 4-5) and an elongate protrusion (25) extends from the closed end (21) of the first cup (20) towards the closed end of the second cup in alignment with the exit aperture in the closed end of the second cup (see Figs. 4-5), the movement of the second cup relative to the neck enabling the exit aperture to be positioned clear of the end of the protrusion (Fig. 5) to permit powder to exit, but also enabling the second cup to be moved so that the end of the protrusion enters and closes off the exit aperture (Fig. 4) to prevent powder from leaving.

In Reference to Claim 40

The holes (30) are arranged in a rectilinear array (see Fig. 7).

17. Claims 30-32, and 36-40 are rejected under 35 U.S.C. 102(b) as being anticipated by US Patent No. 3,194,453 to Cherba (Cherba).

Cherba teaches:

In Reference to Claim 30

A powder container and dispensing device (Fig. 1) comprising a container (K) which in use is partially filled with the powder (freely flowable material such as powder; col. 1, lines 14-19) and includes a neck (18), a powder dispensing nozzle (C) provided in the wall of the container at the outer end of the container neck (see Fig. 1), the nozzle being of the type having one or more small holes (54) through which powder can be ejected, the powder being dispensable by squeezing the container to pressurize its

contents (col. 3, lines 37-41), and an intermediate powder reservoir (space above unlabeled ribs 24 in Fig. 4) in or on which some of the powder within the container becomes lodged in use, wherein the intermediate reservoir comprises a cup (structure 20a; fig. 4) which is fitted within the neck (see Fig. 4) with the closed end of the cup (closed by ribs 24) spaced from the nozzle, and the closed end of the cup includes a plurality of small holes therein (26; Fig. 3) to allow powder to enter the interior of the cup and in which powder can become lodged, such that on squeezing the container, powder lodging in or on the intermediate reservoir is entrained in the airflow through the hole or holes in the nozzle to be discharged therewith, so that in general during each discharge action only powder in or on the intermediate reservoir will exit via the nozzle (the powder container and dispensing device of Cherba has the same structure as claimed and is capable of performing in the same manner).

In Reference to Claim 31

The powder container and dispensing device of Cherba is operable in the manner described in claim 31.

In Reference to Claim 32

The intermediate reservoir (space above unlabeled ribs 24 in Fig. 4) comprises an apertured plate (ribs 24 and openings between; Fig. 3) fitted in the neck (18) of the container.

In Reference to Claim 36

The nozzle is formed by a second cup (C; Fig. 4) which fits over and around the neck (18), the closed end of the second cup including one exit aperture (54) through which powder is discharged when the container is squeezed.

In Reference to Claim 37

The second cup is slidable relative to the neck (col. 3, lines 26-36) and an elongate protrusion (22) extends from the closed end (at 24) of the first cup (20a) towards the closed end of the second cup in alignment with the exit aperture in the closed end of the second cup (see Fig. 4), the movement of the second cup relative to the neck enabling the exit aperture to be positioned clear of the end of the protrusion to permit powder to exit, but also enabling the second cup to be moved so that the end of the protrusion enters and closes off the exit aperture to prevent powder from leaving (col. 3, lines 26-36).

In Reference to Claim 38

The neck is cylindrical and the second cup includes an inner concentric cylindrical wall (48; Fig. 4) which is a sliding fit within the first cup (20a) fitted within the neck.

In Reference to Claim 39

The second cup is a snap fit around a radial protrusion (18) from the wall of the neck (18) to prevent the cup from being pulled completely off the neck (col. 2, lines 42-54).

In Reference to Claim 40

The holes (26) are arranged in a rectilinear array (see Fig. 3).

Claim Rejections - 35 USC § 103

18. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

19. Claims 41, 45-46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Isaacsen in view of US Patent No. 2,207,834 to Stern (Stern).

In Reference to Claim 41

Isaacsen teaches of an apparatus of claim 30, but does not teach the cross-section of each hole in the cup tapers from the end adjacent the interior of the container to the end adjacent the nozzle. Stern, in a similar powder dispenser to that of applicant's and to that of Isaacsen, teaches to provide the cross-section of each hole (18) in the bottom (17) of a cup (above partition) tapers from an end adjacent the interior of the container (below 17) to the end adjacent the nozzle (page 1, col. 2, lines 2-6). It would have been obvious to one having ordinary skill in the art at the time of the invention to have included tapered hole arrangement of Stern on the device of Isaacsen in order to facilitate the accumulation of powder in the intermediate powder reservoir (see Stern, page 1, col. 2, lines 15-34).

In Reference to Claim 45

Isaacsen teaches of an apparatus an associated method of claim 43, but does not teach of coving the nozzle opening while the reservoir is charged. Stern in a similar powder dispenser to that of applicant's and to that of Isaacsen teaches to provide a cap

(13) covering the opening of a nozzle. It would have been obvious to one having ordinary skill in the art at the time of the invention to have included the cap of Stern on the device of Isaacsen in order to prevent inadvertent discharge of powder. When Isaacsen is modified by Stern, the claimed method of use follows directly from the use of the device.

In Reference to Claim 46

Isaacsen teaches of an apparatus and associated method of claim 43, but does not teach the powder being talcum. Stern, in a similar powder dispenser to that of applicant's and to that of Isaacsen, teaches to use their device for a generic unspecified powder. Applicant admits on page one of the specification that talcum powder is known to be dispensed from apertures of dispensing containers. It would have been obvious to one having ordinary skill in the art at the time of the invention to have used talcum powder in the device of Isaacsen to obtain the benefits of the device of Isaacsen with talcum powder, and because Stern teaches it is known to use such devices for powders in general. When applicant's admission and the teaching of Stern are applied to Isaacsen, the claimed method of use follows directly from the use of the Isaacsen device.

Conclusion

20. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. The remaining prior art listed on the attached Notice of Reference Cited have been included because they show powder dispensing devices having resilient containers and intermediate reservoirs.

21. Any inquiry concerning this communication or earlier communications from the examiner should be directed to KENNETH BOMBERG whose telephone number is (571)272-4922. The examiner can normally be reached on Monday-Thursday and alternative Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Kevin P. Shaver can be reached on (571)272-4720. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

22. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

KB

/Kenneth Bomberg/
Primary Examiner, Art Unit 3754